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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE,
and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

**ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN**

BRIEF OF AMICI CURIAE JAMES MacDONALD and ELLIOTT MARANISS URGING AFFIRMANCE

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INTERESTS OF *AMICI*

James MacDonald and Elliott Maraniss are two long-time residents of the State of Wisconsin whose interests will be directly affected by the disposition of the present proceeding. Mr. MacDonald is a Professor of Law at the University of Wisconsin and Mr. Maraniss is the Editor of

the *Madison Capital Times,* a daily newspaper serving Wisconsin's capital city. Both are "independent" voters, who, for nearly the past two decades, have chosen not to affiliate with a political party. For both *amici,* this choice has been one of conscience – neither wholeheartedly subscribes to the goals of any party. Moreover, as a journalist, Mr. Maraniss' interest in remaining impartial is particularly strong. Accordingly, both *amici* have a significant interest in preserving Wisconsin's open primary system which permits them to exercise their franchise in the presidential primary of the party of their choice. Under Wisconsin law, both independents, such as Mr. MacDonald and Mr. Maraniss, and members of the Republican party, may vote in the Democratic presidential primary without publicly declaring allegiance to the Democratic Party.

The interests presented by *amici* in this case are the interests of independent voters who wish to participate in presidential primaries, but who decline to affiliate with an organized political party. It is their position that independent voters have a right, protected by the Constitution, to participate in state-run, federally-financed, and state-mandated presidential primaries. Accordingly, *amici* urge the Court to hold that a State may, in its discretion, enact and enforce open primary laws which accord independent voters the right to vote in the party primary of their choice without having to declare an allegiance to that party. *Amici* express no view as to the propriety of excluding members of the Republican Party from the Democratic Party primary, and their argument would not require the State to continue to allow Republicans, as opposed to independents, from participating in the Democratic presidential primary. Because the interests of *amici* are not co-extensive with those of the State or of the Wisconsin State Democratic Party, a presentation of *amici's* views in

this brief will provide this Court with a different vantage point from which to assess the important constitutional issues raised in this appeal.

SUMMARY OF ARGUMENT

This case presents the question of whether the State of Wisconsin may, consistent with the First Amendment, operate a presidential preference primary system which allows voters who decline to declare publicly that they are affiliated with a given political party to participate in that party's presidential primary. Appellants, Democratic Party of the United States and the Democratic National Committee ("Party"), contend that Wisconsin's failure to require a public declaration of affiliation as a prerequisite to voting raises the spectre that non-Democrats will participate in the selection of the Democratic presidential nominee, thereby infringing appellants' associational rights to select a candidate free from influence by independent and cross-over voters.

Amici submit that this Court should reject appellants' rigid analysis and rule that "closed" primaries, which exclude independent voters, are neither mandated by the Constitution, nor even permitted by it when presidential primaries are run and financed as they are today in Wisconsin.[1] Two points are central to *amici's* argument that the Wisconsin presidential primary system, as it applies to independent voters, is constitutionally compelled:

1. Appellants' argument that Wisconsin's open presidential primary system abridges its associational rights rests on a serious mischaracterization of the nature of the primary process. The linchpin of appellants' argu-

[1] *Amici* express no view as to whether the Constitution requires the exclusion of voters who are members of adverse political parties.

ment – that major political parties are nothing more than private clubs whose members retain a monopoly on all stages of the selection process preceding the general election – is outmoded and has been discredited by this Court. Public financing of presidential primaries and political conventions, coupled with pervasive state and federal regulatory control of the primary process, put to rest any contention that major party primaries are private, internal affairs. *See, e.g., Buckley v. Valeo,* 424 U.S. 1 (1976).

2. Appellants' contention that closed primaries are required by the Constitution places the asserted associational rights of the Democratic Party on a collision course with the rights of independent voters. Endorsement of the Party's position by this Court will inevitably mean that independent voters will be forced into choosing between the exercise of their fundamental rights to vote and to associate in support of a particular candidate on the one hand, and the exercise of their fundamental rights to be free of coerced affiliation and to maintain their privacy of association on the other. Imposition of this choice violates the settled principle that the State may not require its citizens to forego exercise of one fundamental right in order to enjoy another, absent the most compelling justification. *Elrod v. Burns,* 427 U.S. 347 (1976); *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972).

The interests asserted by the Party do not approach this rigorous standard. Appellants contend that a public declaration is needed to assure that only "Democrats" participate in the selection of the Party's candidate. But appellants' portrait of "Democrats" as having a commonly-held set of ideological goals bears little resemblance to the pluralistic, coalition-based parties which in fact predominate. As this Court recently observed: "In many situations, the label 'Republican' or 'Democrat' tells the

voter little." *Buckley v. Valeo, supra,* 424 U.S. at 70. *See also Rosario v. Rockefeller,* 410 U.S. 752, 769-70 (1973) (Powell, J., dissenting). Moreover, appellants disregard the fact that for large numbers of voters, statements of affiliation are nothing more than tickets to the ballot box, importing no acceptance of Party "ideology." Indeed, no meaningful test of Party loyalty is required by the Party and certainly none is at issue here. Thus, the justifications proffered by appellants are not compelling.

Two other factors lend support to *amici's* position. First, independent voters now play an increasingly important role in electoral politics. For various reasons, their ranks have steadily grown over the past decade until at least 38% of the electorate across the country now term themselves independents. It is this broad segment of American voters that appellants' seek to disenfranchise at this critical stage of our political process. Second, the right appellants seek to deny *amici* is perhaps the most basic right enjoyed by citizens in a democracy. As a matter of simple fairness, independents should not be excluded from participation at an integral stage of the process and thus be forced to accept the choices made by their neighbors on so important a matter, absent the most compelling justifications. At a time when increasing numbers of the electorate are dissatisfied with existing institutions, particularly the major political parties, those who seek to participate should not be denied that right, simply to advance the parochial interests of those in leadership positions of the major political parties.

ARGUMENT

I. THE PRIMARY PROCESS IS A PUBLIC FUNCTION AND THUS VOTERS CANNOT BE EXCLUDED ABSENT A COMPELLING GOVERNMENTAL INTEREST.

At the core of appellants' argument is the contention that determining eligibility to participate in the Party's presidental candidate selection process is solely an internal, private Party matter into which the State may not permissibly intrude. This argument is no doubt advanced to sharply narrow the scope of this Court's inquiry. For if this Court concludes that determining voter eligibility for primary elections is in fact a purely private activity of the Party, the issue then framed by this action would be limited to whether the provisions of Wisconsin law directing the Party to allow non-Democrats to participate in the primary is justified by a compelling state interest which overrides the Party's right of association. This characterization of the primary process as a private party concern, however, is seriously in error because it overlooks the fact that the primary is state-run, federally-financed, and state-mandated – thus plainly removing it from the class of private associational activities entitled to heightened First Amendment protection.

Following this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding in large measure the constitutionality of the 1974 amendments to the Federal Election Campaign Act ("FECA"), there can be no plausible claim that presidential primaries remain the private province of the major political parties. While appellants do not cite, much less discuss, the 1976 amendments to FECA, or this Court's decision in *Buckley*, it is necessary to examine the basic changes in the electoral process brought about by FECA to comprehend fully the issues posed in this case.

The 1974 amendments to FECA have been called "by far the most comprehensive reform legislation ever passed by Congress concerning the election of the President, Vice-President and members of the Congress." *Buckley v. Valeo, supra,* 424 U.S. at 7, *quoting* 519 F.2d 821, 831 (D.C. Cir. 1975). Broadly conceived, the amendments, among other things, entirely restructure the financing of the election of federal officials, providing federal funding for all phases of the presidential election process. Two features of the amendments are especially relevant. First, they set up a fund to furnish matching grants to candidates running in presidential primaries. 26 U.S.C. § 9031, *et seq.* Qualifying candidates can draw on federal funds to supply nearly half of their primary expenses. However, because the number of candidates is the largest at this stage of the campaign, the law imposes stringent threshold requirements to restrict public expenditures to only serious candidates – typically those affiliated with a major party.[2] While the overall impact of this radical change in the way primary campaigns are funded has yet to be fully assessed, it is beyond dispute that the federal government is now underwriting the campaign efforts of most of the chief contenders for major party nomination. For example, in the 1976 presidential primary campaign, Democratic candidates received over fifteen million dollars in federal funds; Republican candidates were furnished almost ten million dollars.[3] In the 1980 presidential primary, over 25 million dollars in federal matching grants were disbursed to nine major party candidates.[4] Not a

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[2]Federal Election Commission, *Disclosure Series No. 7: 1976 Presidential Campaign,* 4 (May 1977).

[3]*Id.* at 9.

[4]Federal Election Commission Reports on Financial Activity 1979-1980, *Interim Report No. 7: Presidential Pre-Nomination Campaigns,* 1 (July 1980).

single candidate from a minor or new political party qualified for federal matching funds.[5]

The second important feature of the amendments is that they provide for federal funding of the general election campaign, including over $2,000,000 to each of the major parties to defray the expenses of their nominating conventions. 26 U.S.C. § 9008. Thus, the federal government is providing the funding for the entire range of activities leading up to the choice of the Party's nominees, as well as supporting the Party's general election campaign. The Democratic Party and its primary candidates have, of course, been among the chief beneficiaries of these funding provisions. Although the Party and its candidates remain free to reject federal assistance and thereby preserve the private nature of their selection process, they have not done so. To the contrary, as noted above, massive amounts of federal funds have been committed to, and expended by, the Party and its candidates on the Party's selection process. Since it is the taxpayer, not the Party, footing the bill for a substantial portion of the expenses incurred by the Party's primary candidates, as well as all of the Party's expenses in holding its nominating convention, appellants' argument that the primary process is a purely internal affair cannot be sustained.

Appellants' argument would have had little force even prior to the 1974 amendments to FECA, however. Wisconsin State law regulates pervasively all phases of the primary process. In addition to determining voter eligibility, the State designates the day for the primary, regulates the manner in which the voters cast their ballots, polices the voting areas, and shoulders the expenses that attend the election process. The State cannot, of course, compel the Party to select its presidential nominee through the

[5] *Id.*

primary system. However, once the Party determines to do so, it is then subject to the conditions set forth in the primary laws, and cannot pick and choose as to which provisions it will abide by. Accordingly, in light of the extensive roles of both the federal and state governments, appellants' claim that the primary process is a private Party matter must be rejected.

The fact that major party primaries play a crucial part in the electoral system further undermines appellants' position. The nomination of candidates by the major parties has been called the "most critical stage" of the electoral process. Matthews, *Presidential Nomination: Process and Outcomes,* in CHOOSING THE PRESIDENT 35, 36 (J. Barber ed. 1974) *quoted in* Developments, *Election Laws,* 88 Harv. L. Rev. 1111, 1151 (1975); *see also United States v. Classic,* 313 U.S. 299 (1941). Indeed, this Court long ago observed that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the [major party] nominations have been made." *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Pitney, J., concurring); *see also Storer v. Brown,* 415 U.S. 724, 735 (1974); *Kusper v. Pontikes,* 414 U.S. 51 (1974).

Recognizing the critical importance of the primary, this Court has historically been vigilant in protecting the rights of voters to participate in primary elections. Since the *White Primary Cases,*[6] it has been established constitutional doctrine that any limitation on participation that "touch[es] upon the machinery whereby candidates are nominated" is subject to constitutional scrutiny. *Georgia*

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[6] *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); *Grovey v. Townsend,* 295 U.S. 45 (1935); *Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927).

v. National Democratic Party, 447 F.2d 1271, 1275 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971); *see also* Developments, *Election Laws,* 88 Harv. L. Rev. 1111, 1156-57 & n.33 (1975).

Appellants place principal reliance on this Court's decision in *Cousins v. Wigoda,* 419 U.S. 477 (1975), asserting that it precludes any state law from affecting the delegate selection process in any way. Appellants' Brief at 20. There are several reasons why appellants' position regarding the effect of *Cousins* on this controversy should be rejected.

Cousins arose because the delegate selection rules of the Democratic National Party designed to provide adequate representation to all groups were in direct conflict with the results of a primary conducted under an Illinois statute. This Court held that it was the Party, not the State, that must decide how specific delegate selection contests should be resolved, and that the interests which the State sought to foster were not sufficiently compelling to override the fundamental associational rights of Party members. *Cousins* does not mean, however, that a state law prohibiting discrimination against women would have no effect if the Party had a "men only" delegate rule. *Cousins* simply holds that when the individual state interest in imposing its delegate selection criteria on a national basis is small, and the amount of intrusion in the details of delegate selection and the possibility of subjecting the Party to a multiplicity of contrary rules is great, the associational interest of the Party predominates. Because the mixture of factors in this case differs greatly from *Cousins,* the Court must examine them independently and not mechanically invoke *Cousins* as the Party urges.

There is another more fundamental reason why *Cousins* does not bear on the position taken by *amici.* As we have

demonstrated above, the Party is acting as a governmental agent in connection with the presidential nominating process. Thus, *amici's* principal argument is that because the Party is not a purely private association, the Constitution precludes it from excluding independent voters from the process, unless it can establish a compelling reason for doing so. In *Cousins,* however, this Court did not decide the state action issue but instead ruled on the basis of the effect of a state statute on a private organization. *See* 419 U.S. at 483 n. 4. Therefore, because this Court began its analysis in *Cousins* based on entirely different underlying factual premise than exists here, *Cousins* is not dispositive.

Accordingly, *amici* submit that appellants' contention that a state-run, federally-financed, and state-mandated primary election, the results of which directly affect all voters, is a private Party matter not subject to constitutional constraint, simply cannot stand. To the contrary, in order for this Court to sustain appellants' contention that the exclusion of independent voters is constitutionally required, the Court must first determine that the exclusion directly furthers an overriding governmental interest — one which is so weighty that it justifies submerging the fundamental interests of independent voters to those of the Party. And, as we now demonstrate, no such showing has been, or could be, made by the Party.

II. APPELLANTS' ARGUMENT IGNORES THE CONSTITUTIONALLY PROTECTED RIGHTS OF INDEPENDENT VOTERS.

The defects inherent in appellants' argument become even more apparent when arrayed against the constitutionally protected rights of independent voters that closed

primaries infringe upon. While *amici* recognize that the constitutionality of one closed primary system has been upheld, *see Nader v. Schaffer,* 417 F. Supp. 837 (D. Conn.), *aff'd mem.,* 429 U.S. 989 (1976), that decision is not controlling here. In the first place, that case held only that closed primary laws were constitutional – not that they are constitutionally required. Indeed, the decision strongly suggests that open primary laws would pass constitutional muster, noting that the "states have broad discretion in formulating election policies." *Id.* 417 F. Supp. at 850 (citations omitted).

More importantly, *Nader* arose in the context of a broad-scale attack on Connecticut's primary system, including primaries concerning the election of state officials. In marked contrast, the question here is narrowly focused upon participation in presidential preference primaries. As noted above, the fact that these primaries are run by the state, financed by the federal government, mandated by state law, and concern the selection of our Nation's highest office-holders, substantially alters the nature of the constitutional inquiry. Thus, *amici* submit that the question in this case devolves into whether the State, in its discretion, may opt for an open presidential primary law. In light of the fact that closed primaries directly abridge several fundamental rights of independent voters, *amici* submit that when the justifications proferred by appellants for mandating closed primaries are balanced against the rights of independent voters to exercise fully certain fundamental rights protected by the Constitution, it becomes clear that the States should at least have the latitude of determining that the rights of independent voters need not be subordinated to those of the Party.

Prior decisions of this Court firmly establish that the total exclusion of independent voters from the primary

process infringes their right to vote. In a series of cases, this Court has held that under the equal protection clause of the Fourteenth Amendment, every citizen enjoys a fundamental right to vote, equal to that of other citizens. *E.g., Reynolds v. Sims,* 377 U.S. 533 (1964). A number of decisions have expressly recognized that the reach of the equal protection clause extends to the right to vote in primary elections. *Rosario v. Rockefeller,* 410 U.S. 752 (1973); *Bullock v. Carter,* 405 U.S. 134 (1972); *Gray v. Sanders,* 372 U.S. 368 (1963). One of the basic principles articulated by this Court in protecting the right to vote is that once the State has provided for popular elections, it may not disenfranchise any voters "who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote." *Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *accord, Hill v. Stone,* 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 207-13 (1970); *Kramer v. Union Free School District,* 395 U.S. 621, 632-33 (1969). All voters are affected in much the same way by the results of major parties' primary elections since the choice presented to everyone in the general election is significantly narrowed. *See Newberry v. United States,* 256 U.S. 232, 286 (1921) (Pitney, J., concurring).

Prior decisions of this Court make it equally clear that *amici* also enjoy a right to associate in support of a particular candidate, regardless of their or the candidate's party affiliation, and that full enjoyment of this right would be denied to them if appellants' position was accepted by this Court. In *Buckley v. Valeo, supra,* this Court upheld the FECA's limitations on contributions to candidates, despite the fact that the limitation burdened "one important means of associating with a candidate." *Id.* at 22. By contrast to the ability to contribute money

freely, which this Court viewed as a "narrow aspect of political association," *id.* at 28, the ability to *vote* for a candidate is at the core of associational rights. *Kusper v. Pontikes,* 414 U.S. 51 (1973). By seeking to deny *amici* the right to vote for particular candidates in primary elections, appellants are, in effect, advocating that *amici's* rights to associate freely in support of those candidates be sharply curtailed.

Appellants' argument, if adopted, would also deprive independent voters of their right not to be coerced into unwanted association. This right was recognized in *Elrod v. Burns,* 427 U.S. 347 (1976), where this Court held that state officials may not condition retention of public employment on affiliation with a political party. In so holding, Mr. Justice Brennan's plurality opinion emphasized that coercion of allegiance itself violates an individual employee's associational rights. "Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs." *Id.* 355. This Court recently reaffirmed the vitality of *Elrod v. Burns* in upholding the right of professional employees, namely attorneys serving as public defenders, to be free from coerced political affiliation in order to retain employment. *Branti v. Finkel,* 100 S.Ct. 1287 (1980). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 234-37 (1977); *Wooley v. Maynard,* 430 U.S. 705, 714-16 (1977); *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943). To compel independent voters who decline to join a party as a matter of principle, to declare an unwanted party affiliation in order to secure the right to vote is no less offensive than the coercion disapproved of in *Elrod* or in *Branti.*

A close corollary to the right to be free of unwanted association is the right to privacy of association. The

public declaration advocated by appellants would, if accepted, plainly infringe the privacy rights of *amici*. *Amici* would then be faced with the impermissible choice between exercising their right of privacy and other constitutional rights, or opting to preserve their privacy by not affiliating. *Speiser v. Randall,* 357 U.S. 513 (1958). This Court has long recognized that privacy of association and other forms of privacy of belief have an inherent value that warrants constitutional protection. *See Buckley v. Valeo, supra,* 424 U.S. at 64-66; *id.* at 237-38 (Burger, C.J., dissenting); *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965); *Talley v. California,* 362 U.S. 60, 64 (1960). Yet there can be little doubt that if appellants prevail, and *amici* ultimately succumb to the declaration requirement by swearing an allegiance they do not feel, publication of a list identifying them with a particular party would invade their right of privacy. For independent voters who have a professional need to maintain public neutrality, such as journalists like Mr. Maraniss, the need to safeguard the right of privacy of political belief is particularly pronounced.

By asking this Court to impose a requirement that independent voters either affiliate with a party or forego voting in primary elections, appellants are effectively seeking to compel *amici* to choose between exercise of their fundamental rights to be free of coerced association and to maintain their privacy of association on the one hand, and their fundamental rights to vote and to associate in support of candidates on the other. This choice is impermissible absent the most "compelling" justifications. *Dunn v. Blumstein,* 405 U.S. 330, 342 (1970).

The justifications advanced by appellants do not meet this exacting standard. As noted above, the crux of appellants' argument is that open primaries infringe the Par-

ty's associational rights, and that the State may not enforce primary laws which in any way impinge upon the Party's rules governing voter eligibility.[7] *Amici* acknowledge that the associational rights of party members protect them from some forms of *governmental* interference. *Cousins v. Wigoda,* 419 U.S. 477 (1975). However, as here, when private associations voluntarily accept public funding for their primaries and their conventions, and link their activities with a state-run function, they surrender their associational rights to the extent that they enjoy the protections and benefits conferred by the government. If the combined actions of government and association deprive others of their constitutional rights, the association itself is subject to the constraints of the Fourteenth Amendment. *Gilmore v. City of Montgomery,* 417 U.S. 556, 575 (1974); *see Norwood v. Harrison,* 413 U.S. 455, 470 (1973); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 Colum. L.Rev. 656, 659 (1974). Thus, at least insofar as their activities touch upon determining voter eligibility, appellants are subject to the requirements of the Constitution.

Appellants' argument also fails to distinguish between the associational interests of the political parties and the governmental interests needed to sustain the closed primary system that they claim the Constitution compels. When a state intervenes to protect and benefit what is alleged to be a private association, it must have a *public* purpose for doing so. As Mr. Justice Brennan cautioned in *Elrod v. Burns, supra,* "care must be taken not to confuse

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[7]Appellants could themselves avoid this problem by not relying on primaries and reverting to privately run and privately funded state caucuses or conventions of party members.

the interests of partisan organizations with governmental interests. Only the latter will suffice [to justify state action]." 427 U.S. at 362. This Court has never held that the government's interest in preserving the existence, influence or composition of the two major parties may be elevated over the fundamental rights of non-members. This Court's decisions upholding statutes which favor the two major parties, or impose burdens on minor parties or independent candidates, have rested on a legitimate governmental interest in maintaining the stability of the election process, not on the hope of preserving the predominance of the Democrats and Republicans.[8]

It is not altogether clear what governmental purpose would be served by excluding independents from primary elections. Appellants contend that closed primaries are needed to shield the parties from intrusion by those with adverse principles. But this concept presumes that it is possible to discern what a party's principles are. As this Court has recognized, the goals and philosophies of the major political parties, especially on the national level, are kept purposely vague and indeterminate in order to attract the widest possible support. *See, e.g., Buckley v. Valeo,*

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[8]Thus, the government may attempt to see that general election winners have the support of a majority or near majority of citizens, that factionalism is not rampant, and that campaign financing flows more readily to those whose messages are more likely to be heeded. *See Buckley v. Valeo, supra,* 424 U.S. at 96; *Storer v. Brown, supra,* 415 U.S. at 733-36; *American Party of Texas v. White,* 415 U.S. 767 (1974); *Bullock v. Carter,* 405 U.S. 134 (1972); *Jenness v. Fortson,* 403 U.S. 431 (1971). But it may not deny minor parties or independent candidates a realistic opportunity to gain access to the ballot or discriminate against legitimate candidates. *Storer v. Brown, supra,* 415 U.S. at 739-40; *Bullock v. Carter, supra,* 405 U.S. at 145-47; *Williams v. Rhodes,* 393 U.S. 23, 31-32 (1968). Nor may it entrench "one or a few parties to the exclusion of others." *Elrod v. Burns, supra,* 427 U.S. at 369; *accord, Williams v. Rhodes, supra,* 393 U.S. at 32.

supra, 424 U.S. at 70; *Rosario v. Rockefeller,* 410 U.S. 752, 769-70 (1973) (Powell, J., dissenting).[9]

Furthermore, appellants do not contend that the Party would even attempt to screen potential voters to ensure that they adhere to the Party's platform or other doctrines. No ideological test or loyalty oath is administered, and no durational requirement is imposed. Yet it is impossible to distinguish between a self-declared Democrat who would be allowed to participate and an independent voter in terms of loyalty to the goals and principles pursued by the Party. Indeed, all that the Party seeks is to force voters to undergo a mechanical process of affiliation which reveals nothing about their true sentiments. For many independent voters, however, the process of public affiliation is hardly mechanical. Reliance on the fact of party affiliation begs the question of whether independents have principles "adverse" to those of party members. If this Court is correct in its observation that "most voters" enroll with a party in order "to gain a voice in the selection process," *Kusper v. Pontikes, supra,* 414 U.S. at 58, then the declaration by itself indicates virtually nothing about devotion to the party or constancy in support of its candidates.

One additional factor counsels rejection of appellants' position. Independent voters are fast becoming the major

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[9] *Amici* acknowledge that appellants' contention may have some merit where it concerns excluding members of opposing political parties from participation. Indeed, the principal thrust of appellants' argument appears to be aimed at excluding members of adverse parties from the Democratic Party primary. *See* Appellants' Brief, at 6 & 22. However, appellants' attempt to sweep independent, non-aligned voters into the same category as partisans is totally unjustified.

segment of the voting public.[10] For a variety of reasons, over the past decade the ranks of independent voters have steadily grown until now 38% to 40% of the voters across the country term themselves independents.[11] That figure almost equals the number of voters who consider themselves "Democrats" and far outstrips the number who call themselves "Republicans."[12] For younger voters, the movement away from the major parties is even more pronounced: 45% of the voters nationwide under 30 years of age are independents.[13]

Two characteristics mark this segment of the electorate. First, the attitudes of contemporary voters indicate that they are more sophisticated politically than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote . . . . [T]he new independence has emerged among the young, well educated, professional voters largely as a response to issues."[14] Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are

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[10]The figures discussed reflect voter affiliation as of 1974 and are taken from data compiled by the Survey Research Center for Political Studies at the University of Michigan. These studies are analyzed in N. Nie, S. Verba & J. Petrocik, THE CHANGING AMERICAN VOTER 49 (Harv. Univ. Press 1976) ("Nie"), a comprehensive study of American voting behavior. Similar figures are reported in L. Mulcahy & R. Katz, AMERICA VOTES 46 (Prentice-Hall 1976) ("Mulcahy"), and in a study conducted by the Kennedy School of Government, VOTERS, PRIMARIES AND PARTIES 6 (Harv. Univ. Press 1976) ("Kennedy School Study").

[11]Nie at 49; Mulcahy at 46; Kennedy School Study at 6.

[12]Kennedy School Study at 6.

[13]See Nie at 64, Mulcahy at 46.

[14]Mulcahy at 48; *see* Nie at 94-95.

unlikely to surrender their independence for partisanship.[15] Thus, the voters most directly affected by the results of this suit represent a large, distinct group likely to have a continuing influence on the shape of American politics. It is this segment of voters that appellants would exclude from the primary process.

As is clear, appellants' contention launches the purported associational rights of the Democratic Party into a head-on confrontation with the rights of independent voters. *Amici* submit that, insofar as independent voters are concerned, closed primaries are not permitted, let alone required, by the Constitution. Moreover, where, as here, the State has determined that an open primary system best serves the legitimate interests and needs of the State, nothing in the Constitution compels the State, or this Court, to shut the door to the voting booth to independent voters.

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[15]Mulcahy at 48; Nie at 94-95.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision of the Supreme Court of Wisconsin should be affirmed and this Court should declare that states are not bound by the Constitution to exclude duly registered voters from participating in state-run, publicly financed and state-mandated primary elections merely because those voters prefer to remain independents and refuse to declare an allegiance to a party.

Respectfully submitted,

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